Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1313

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION,

Petitioner,

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, International Telephone and Telegraph Corporation, Communications Equipment and Systems Division (hereinafter ITT-CESD), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 486 F. 2d 863. The Decision and Order of the National Labor Relations Board which was reviewed by the Court of Appeals is reported in 197 NLRB No. 127. The Decision and Determination of Dispute of the National Labor Relations Board, which is the Board's determinination of a union jurisdictional dispute, is reported in 191 NLRB No. 122. All three (3) opinions are appended to this petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1973. Thereafter, a rehearing was sought which was denied by the Court of Appeals on November 26, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Seventh Circuit properly decided that contrary to the National Labor Relations Board's established procedures, that agency must conduct jurisdictional dispute proceedings under §10(k) of the Labor Management Relations Act in accordance with the provisions of the Administrative Procedure Act applicable to adjudications (§554, §556 and §557).

2. Whether the subsequent prosecution of an unfair labor practice case by the same NLRB attorney who presided at the prior §10(k) hearing is an improper commingling of prosecutorial and adjudicative functions proscribed by §554 of the Administrative Procedure Act.

STATUTES AND REGULATIONS INVOLVED

The following sections of the Labor Management Relations Act (L.M.R.A.), 29 U.S.C. §151 *et seq.* are applicable to this case and are appended verbatim to this petition: §8(b)(4)(D), §10(f) and §10(k). The following sections of the Administrative Procedure Act (A.P.A.), 5 U.S.C. §500 *et seq.* are applicable and are appended verbatim: §551(6), §551(7), §554, §556 and §557. Section 101.34 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. §101.34, is applicable to this case and is appended verbatim.

STATEMENT OF THE CASE

Upon a charge filed by ITT-CESD a hearing was held before a duly designated hearing officer of the National Labor Relations Board (hereinafter designated as "Board") under §10(k) of the Labor Management Relations Act, 29 U.S.C. §160(k), for the purpose of hearing facts concerning competing work jurisdiction claims by Local 134, International Brotherhood of Electrical Workers (hereinafter designated as "Local 134") and the Communications Workers of America (hereinafter designated as "CWA").

The Board issued its Decision and Determination of Dispute on June 30, 1971, wherein it awarded the disputed work to employees of ITT-CESD represented by the CWA, rather than to employees of other employers, represented by Local 134.

Following the refusal of Local 134 to comply with the Board's jurisdictional award, a complaint against local 134 issued, alleging a violation of §8(b)(4)(D) of the L.M.R.A., 29 U.S.C. §158(b)(4)(D), and a hearing was held thereon before an Administrative Law Judge. The

Administrative Law Judge's decision and recommended order was issued on February 7, 1972, finding that Local 134 had violated §8(b)(4)(D). On June 22, 1972, the Board issued its Decision and Order affirming the findings of the Administrative Law Judge.

The attorney for the Board who prosecuted the unfair labor practice case is the same person who presided at the §10(k) hearing.

Upon Local 134's failure to comply with the Board's Decision and Order, the Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of the Board's Order pursuant to 29 U.S.C. §160(e).

On September 20, 1973, the Court of Appeals issued its decision and order denying enforcement of the Board's Decision and Order. The Court of Appeals did not disturb the Board's jurisdictional award but rather found that:

> "Testimony at the §10(k) hearing clearly indicates that employees represented by the CWA customarily install and test equipment similar to that involved here in Cook County and the Board determined that by area, employer, and industry practice, and by skill and training, the CWA employees were more entitled to perform the disputed work than employees of Local 134." (486 F. 2d at 865).

The Court of Appeals also did not disturb the Board's findings and conclusions in the subsequent unfair labor practice proceedings. Specifically, the Court of Appeals held that:

> "[ITT-CESD] . . . was coerced by Local 134 in an attempt to have the work assigned to employees the local represented. In these circumstances the employer was 'trapped' in a jurisdictional dispute between the two contesting unions . . . Such is the very activity §8(b)(4)(D) was intended to prohibit." (486 F. 2d at 866).

The basis for the Court of Appeals' denial of enforcement of the Board's Order, was that the individual who acted as the hearing officer in the §10(k) proceeding was not an administrative law judge pursuant to 5 U.S.C. §556 and also that the same person later acted as the prosecutor of the unfair labor practice complaint. On these facts the Court of Appeals concluded that there had been a commingling of prosecutorial and adjudicative functions in violation of §554 of the Administrative Procedure Act (A.P.A.), 5 U.S.C. §554.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH A DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT.

The decision of the Seventh Circuit for which this writ of certiorari is sought holds that a §10(k) jurisdictional dispute proceeding is an adjudication within the meaning of §554 of the A.P.A. and that the requirements of §554 and other related sections of the A.P.A. are applicable to the conduct of §10(k) proceedings. The Court of Appeals stated that:

> "It is apparently admitted that §554 applies to §10(k) hearings."[1]

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[1] Quite to the contrary, it was not admitted that §554 of the A.P.A. is applicable to §10(k) hearings. ITT-CESD, the Board, and the CWA, all argued extensively in their briefs that §10(k) hearings are not encompassed by any of the provisions of §554, §556 and §557.

Upon this erroneous premise that court continued as follows:

> "And §556 of the Act provides in presently material part that, in hearings required to be conducted in accordance with §554 '. . . [t]here shall preside at the taking of evidence . . . one or more hearing examiners appointed under Section 3105 of the title.' Section 3105 provides in presently material part that hearing examiners '. . . may not perform duties inconsistent with their duties and responsibilities as hearing examiners.' This is, we think, a specific manifestation of the congressional intent that administrative officers who preside at such hearings be completely 'isolated,' 'impartial,' and 'independent'. . .; that there shall be no 'commingling' of the functions of investigation or advocacy with the function of decision making. . . .'It has been said that hearing examiners are the administrative equivalent of federal judges.' Indeed, the title of hearing examiner has recently been changed to 'Administrative Law Judge.' " (486 F. 2d at 867). (citations and footnotes omitted).

The Seventh Circuit's holding that §554 and §556 are applicable to §10(k) proceedings is in direct conflict with the decision of the District of Columbia Circuit in *Bricklayers, Masons and Plasterers Int'l. Union v. N.L.R.B.*, 475 F. 2d 1316 (CA, D.C., 1973). In *Bricklayers*, the respondent union argued the unenforceability of a Board order based upon a violation of §8(b)(4)(D). It asserted, as was done in the instant case, that the determination of dispute in the §10(k) proceeding had been contrary to §554 because there had been no recommended decision by an administrative law judge. In rejecting this, the District of Columbia Circuit stated:

> ". . . [O]nly if a §10(k) determination is an adjudication within the meaning of §554 would a recommended decision have been required. We hold that a decision in a §10(k) proceeding is not an adjudication within the meaning of 5 U.S.C. §554." (*Id.* at 1318) (footnote omitted).

The District of Columbia Circuit's holding was based, in part, on an examination of the A.P.A. legislative history from which it gleaned the following definition of "adjudication".

> ". . . If the action in question does not lead to a 'final disposition' by the agency, it may not be an adjudication." (*Id.* at 1319) (footnote omitted).

The decisions of the Seventh and District of Columbia Circuits are obviously irreconcilable. Both, however, consider the operative question to be whether the §10(k) proceeding is an adjudication which results in an "order" of the Board. In reaching contrary conclusions on this point, both decisions draw upon this Court's decision in *N.L.R.B. v. Plasterers Union No. 79*, 404 U.S. 116 (1971), specifically the Court's statement that:

> ". . . But the §10(k) decision standing alone, binds no one. No cease and desist order aginst either union or employer results from such a proceeding; the impact of the §10(k) decision is felt in the §8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a §10(k) decision against it, a §8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the §10(k) decision and the employer does not comply, the employer's §8(b)(4)(D) case evaporates and the charges filed against the picketing union will be dismissed. Neither the employer nor the employees

to whom he has assigned the work are legally bound to observe the §10(k) decision, but both will lose their §8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's §10(k) decision." (*Id.* at 126-127) (footnote omitted).

The implication drawn from the above-quoted language from *Plasterers* by the District of Columbia Circuit is stated in its decision as follows:

"The scheme for and consequence of a section 10(k) hearing thus are not adjudicatory, notwithstanding that in reaching its determination the Board resolves a factual issue." (475 F. 2d at 1321).

The Seventh Circuit's interpretation of this Court's statement in *Plasterers* is that:

"... It is, we think, an oversimplification to say that the §10(k) hearing has no binding effect. As Justice White put it in ... [Plasterers] ...

'... [T]he impact of the §10(k) decision is felt in the §8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a §10(k) decision against it, a §8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the §10(k) decision and the employer does not comply, the employer's §8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed.' " (486 F. 2d at 867).

Thus, the Seventh Circuit emphasizes the likelihood of unfair labor practice liability resulting to a union after an adverse §10(k) award and has therefore concluded that the §10(k) proceeding is an adjudication. The District of Columbia Circuit, on the other hand, emphasizes the non-binding aspect of the §10(k) award and concludes that it is not an adjudication.

The fact that two (2) courts of appeals have rendered completely contradictory decisions on an important question of law concerning the statutory scheme for the resolution of jurisdictional disputes is reason alone for this Court to grant a writ of certiorari for the purpose of resolving the appellate conflict.

II.

THE DECISION OF THE SEVENTH CIRCUIT PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THE SUPREME COURT.

Even if the Seventh Circuit's decision were not in conflict with any other court of appeals decision, the effects of its decision, if allowed to stand, will have such far reaching consequences for the future resolution of jurisdictional disputes that this Court should grant review.

The Seventh Circuit's decision that §10(k) proceedings are adjudications under §554 spawns many more procedural problems than the one it seeks to remedy, i.e., prevention of the same Board attorney from presiding at the §10(k) hearing and later prosecuting the unfair labor practice complaint against the recalcitrant union.[2] If that

[2] Even if the §10(k) proceeding were an adjudication, §554(d) only proscribes the same person participating in the decisional

were the only effect of the Seventh Circuit's holding, the Board could easily comply by simply having a different attorney prosecute the §8(b)(4)(D) complaint.[3]

Far more significant is the Seventh Circuit's holding that the §10(k) hearing must be conducted by an administrative law judge as required by §556; that the administrative law judge must render a recommended decision as required by §554(d) and §557; and that the parties must have the opportunity to submit proposed findings and conclusions before the recommended decision is issued and exceptions to that decision after it is issued as required by §557(c).

Since §10(k) was enacted in 1947, the Board has always construed its mandate to resolve jurisdictional disputes as one which requires the same degree of speed and informality that is attendant with §9 questions concerning representation. Thus, in *Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341 (1949), the Board stated:

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aspects of a case after he prosecuted it. In the instant case, the prosecutorial role of the Board's attorney was *subsequent* to the decisional role, if presiding at the §10(k) hearing can be construed as decisional. The Board, of course, does not invest the §10(k) hearing officer with any decisional authority and provides in its Statements of Procedure that "The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board . . . At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute." (29 C.F.R. §101.34)

[3] In fact, the Board does not ordinarily assign the same person to conduct related §10(k) hearings and §8(b)(4)(D) unfair labor practice cases.

> "The Respondents assert that Section 8 [now §557] of the Administrative Procedure Act applies to a proceeding under Section 10(k) of the National Labor Relations Act, as amended. We do not agree. Under Section 202.32 of the Board's Rules and Regulations–Series 5, as amended, the hearing under Section 10(k) is non-adversary in character, and, according to the procedure adopted therefore, conducted in the same way as a hearing in a representation proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies." (*Id.* at 341)

To the same effect is the Board's holding in *International Longshoremen's & Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626 (1959).

The Board's long standing interpretation of §10(k) procedure is not without judicial support from courts of appeals and even this Court, as noted by the District of Columbia Circuit's decision in *Bricklayers, supra*, wherein the Court stated:

> ". . . Furthermore, we are faced with an unusually impressive administrative interpretation supporting the conclusion we reach, first adopted by the Board as long ago as 1949 in National Union of Maritime Cooks and Stewards (Irwin Lyons Lumber Co.), *supra*, repeated in 1959 in Local 8, Longshoremen (General Ore, Inc.), 124 NLRB 626, and until now,

we believe, not questioned by courts or Congress. This interpretation of section 10(k) by the Board is entitled to great weight. United States v. American Trucking Assn., Inc., 310 U.S. 534, 549, 60 S. Ct. 1059, 84 L. Ed. 1345 (1940); Norwegian Nitrogen Products Co. v. United States, 228 U.S. 294, 315, 53 S. Ct. 350, 77 L. Ed. 796 (1933). Cf. United States v. Florida East Coast Ry. Co., *supra*, 410 U.S. 224, 236, N. 6, and dissenting opinion at 246, 93 S. Ct. 810, 35 L. Ed. 2d 223. It is noteworthy also that in neither NLRB v. Plasterers' Union No. 79, *supra*, nor NLRB v. Radio & Television Broadcast Engineers Union No. 1212, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302, (1961), was there a hearing officer's recommended decision in the section 10(k) proceedings there involved, although, we must add, no question in that respect was raised." (475 F. 2d at 1321) (footnote omitted).

If the Seventh Circuit is correct, the Board must fundamentally change the manner in which it procedurally resolves jurisdictional disputes so as to comply with the provisions of the A.P.A.[4] In doing so, however, an obvious conflict with the statutory scheme for the speedy resolution of jurisdictional disputes is presented. The additional time incurred between the initiation of the Board's §10(k) proceedings and the rendering of its decision will be significant if the case must await

[4]The Board, of course, may refuse to abide by the Court of Appeals' holding but to do so it risks having its jurisdictional awards and subsequent cease and desist orders denied enforcement in the Seventh Circuit unless that court recants and reverses itself in a later case. This is unlikely, however, because the Seventh Circuit denied the Board's, ITT-CESD's, and the CWA's petitions for rehearing in this case.

assignment of an administrative law judge, allow for time to submit proposed findings and conclusions, and file exceptions to the recommended decision of the administrative law judge.

Even more destructive of congressional intent than the lengthening of the time internal to the Board's handling of a jurisdictional dispute, is the potential for drastic delays which may result from the superimposition of the A.P.A.'s definition of "adjudication" and "order" on the Board's §10(k) decision after it finally is rendered. Adjudication is defined in §551(7) of the A.P.A. as "agency process for the formulation of an order." Order is defined in §551(6) as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . ."

If the §10(k) proceeding is an adjudication and the jurisdictional award is an "order" rendered by the Board, after a hearing conducted by an administrative law judge, that order must, under §551(6), be a "final order" and therefore may be reviewed by a court of appeals under §10(f) of the L.M.R.A., 29 U.S.C. §160(f).[5] This circumstance would create the anamolous situation of a jurisdictional "order" being enforced or set aside by a court of appeals, after which, if it were enforced, an entirely new adjudication of the unfair labor practice would result with another hearing before an admin-

[5]That section provides in part that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . .".

istrative law judge, another "order" of the Board, and, if necessary, another review by a court of appeals. This extraordinary time consuming procedure would, of course, be directly contrary to the Congressional purpose of enacting §10(k) as a short-stop measure to resolve such disputes administratively and thereby prevent a protracted adjudication—or adjudications.

The absurdity of a court of appeals reviewing a jurisdictional "order" before any order or finding concerning the commission of an unfair labor practice, merely serves as an indication of the incompatability of the Seventh Circuit's imposition of the A.P.A.'s provisions on the L.M.R.A.'s procedures for the resolution of jurisdictional disputes. Congress certainly did not consciously intend to marry the two (2) statutes in the manner required by the Seventh Circuit's decision.

The District of Columbia Circuit was obviously conscious of the congressional intent to avoid the delay which would be occasioned by converting the §10(k) proceeding into an "adjudication" and accordingly stated as follows:

> ". . . In the first place there is need, obviously, for as expeditious a resolution of the jurisdictional dispute as is reasonably possible. We must also give consideration to the deep-seated concern Congress had with delays caused by judicial intervention in representation cases in pre-Wagner Act days. See American Federation of Labor v. NLRB, *supra*." (475 F. 2d at 1321).

CONCLUSION

The protections embodied in the A.P.A. must be reconciled with the federal labor policy set forth in the L.M.R.A. for the resolution of jurisdictional disputes in a manner which preserves to each the essential purposes for its enactment. It is submitted that the Seventh Circuit's decision totally emasculates the purpose for which §10(k) was enacted while the District of Columbia Circuit's sharply contrasting decision properly construes both statutes so as to preserve the essential purposes of each. The decision below is an appropriate vehicle upon which this Court should invoke its jurisdiction because that decision not only presents a fundamental question of statutory construction, it has also created a serious impediment to the Board's ability to effectively resolve jurisdictional disputes.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit
486 F.2d 863 (1973)

September Term, 1972–April Session, 1973

No. 72-1822
Local 134, International Brotherhood
of Electrical Workers, AFL-CIO,
Petitioner,

v.

National Labor
Relations Board

*National Labor Relations Board,
Respondent.

Argued April 18, 1973–Decided September 20, 1973

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864 Before Swygert, *Chief Judge,* Murrah* and Barnes,** *Circuit Judges.*

Murrah, *Circuit Judge.* This is an appeal by a labor union from an order of the National Labor Relations Board (the Board) finding that the union had committed a § 8(b)(4)(D) unfair labor practice in a jurisdictional dispute over installation of telephone equipment. The

*Senior Judge Alfred P. Murrah of the United States Court of Appeals for the Tenth Circuit sitting by designation.

**Senior Judge Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit sitting by designation.

*13-CD-209; 197 NLRB No. 127

dispute arose in this way. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation (the Company) contracted with the Village of Elk Grove, Illinois, to sell, install, test, and maintain a private telephone system for the Elk Grove Village Firehouse and City Administration Offices. This work involved two stages, (1) "pulling cable," *i.e.,* routing the telephone cable to the telephone instruments, and (2) "terminating the cable," that is installing and testing the Private Branch Exchange (PBX) switch system and telephone instruments. The Company subcontracted the "pulling cable" phase to the C. A. Riley Electric Construction Co., whose employees are represented by Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Local 134); the terminating phase was to be accomplished by Company technicians represented by the Communication Workers of America (CWA).

The Local 134 business agent objected to this work assignment, telling Company officials that Local 134 did all telephone and PBX installation and maintenance work in that area, that CWA would not install telephone equipment in Cook County, and that "[w]e'd better get that work or there will be trouble."

When CWA technicians appeared at the job site to begin their assigned work, the Local 134 steward announced to his fellow workers either, "I can't work here" or "we can't work here."[1] He and the other Local 134 employees subsequently left the job site, and none returned until the Company agreed that no CWA employees would be on the site. When the Local 134

[1] There is some conflict in the evidence as to his exact words, but the difference is not material.

employees had finished "pulling" the cable, the CWA workers returned and completed the "terminating" phase.

The Company then filed a charge alleging that Local 865 134 had violated §§8(b)(4)(i) and (ii)(D) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4)(i) and (ii)(D), which provide in presently material part that it shall be an unfair labor practice for a labor union or its agents to induce or encourage and employee.

> "(i) . . . to engage in . . . a refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
>
> * * * * *
>
> "(D) Forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization. . . ."

A hearing on the charge, conducted by a hearing officer in accordance with the provisions of §10(k) of the Act, 29 U.S.C. §160(k),[2] resulted in a finding that

[2] Section 10(k), 29 U.S.C. §160(k), provides that

"[w]henever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practices shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

employees represented by Local 134 were not entitled to the disputed work assignment, and that Local 134 was therefore not entitled to attempt to coerce or force the Company to assign the disputed work to its members. When Local 134 informed the Board's Regional Director of its decision not to acquiesce in the Board's determination, the Regional Director issued this unfair labor practice complaint. Upon a §10(b) hearing, 29 U.S.C. §160(b), the Board adopted the §10(k) findings, and accordingly determined that Local 134 had committed a §8(b)(4)(D) unfair labor practice.

In this §10(e) enforcement proceeding, Local 134 takes the position that all of the installation work involved here has customarily been performed by Local 134 and, relying upon Longshoremen and Warehousemen's Local 8 (Waterway Terminals Co.), 185 NLRB No. 35, and the rationale in Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967), contends that the Board erroneously found in the §10(k) proceeding that the work should be awarded to CWA. In the *Waterway Terminals* and other referenced cases the Board, recognizing the concept of customary work assignments, held that §8(b)(4)(D) was not designed to proscribe union attempts to retrieve the jobs of employees whom the employer had supplanted by reallocating their work to others. Contrary, however, to the position of the union, we do not have a customary work assignment case in which work is usurped from workers of one union by reallocation to workers of another union. Testimony at the §10(k) hearing clearly indicates that employees represented by CWA customarily install and test equipment similar to that involved here in Cook County, and the Board determined that by area, employer, and

industry practice and by skill and training, the CWA employees were more entitled to perform the disputed work than employeees of Local 134.

In the *Woodwork Manufacturers* case a trade association filed a § 8(b)(4)(B) charge, claiming that it was an unfair labor practice for carpenters to refuse to handle pre-cut and pre-fitted doors manufactrued by a member of the association. The NLRB dismissed this particular charge (149 NLRB 646), and the Court of Appeals affirmed (354 F.2d 594, 599 (7th Cir. 1965)). The Supreme Court also affirmed, based upon the Board's
866 specific findings to the effect that the union's conduct involved only a primary contract dispute with the employer over preservation of job-site work customarily performed by the contracting union, rather than a secondary jurisdictional dispute between two unions, and was therefore not prohibited by § 8(b)(4). The court concluded that, viewed as a whole, § 8(b)(4) was manifestly intended to protect genuinely neutral employers from coercive pressures in disputes not their own; and rationalized that "[t]he prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between the two claims." 386 U.S. at 625. In both *Woodwork Manufacturers* and *Waterway Terminals* the Board and the courts were concerned with the concept of customary work assignments, and simply applied that doctrine to exempt the disputes from the prohibitions of § 8(b)(4).

The insurmountable difficulty confronting the union here is that the salient and controlling facts of its case do not fit the facts of the cases upon which it relies. In our case the Company is a party to a collective bargaining agreement with CWA, covering installation operations, pursuant to which the work in question was assigned to

CWA. At the § 10(k) hearing it was concluded that "considerations of collective-bargaining history and agreements favor assignment of the work to employees represented by CWA." Unlike the circumstances of *Woodwork Manufacturers* and *Waterway Terminals*, then, the Company assigned the work to CWA in accordance with a current collective bargaining agreement, but was coerced by Local 134 in an attempt to have the work assigned to employees the Local represents. In these circumstances the employer was "trapped" in a jurisdictional dispute between the two contesting unions. Stated another way, the Local 134 activities complained of did not involve a primary dispute with the employer over fulfillment of its contract for work customarily performed, but were secondary pressures designed to influence the employer concerning a jurisdictional union dispute. Such is the very activity § 8(b)(4)(D) was intended to prohibit. 386 U.S. at 625. *See also National Labor Relations Board v. Local Union No. 9*, 255 F.2d 649 (4th Cir. 1958). We certainly cannot say that the Board's decision was not supported by the controlling facts of the case. *See, e.g., NLRB v. Akin Products Co.*, 209 F.2d 109 (5th Cir. 1953).

Compliance With the Requirements of the Administrative Procedure Act

Local 134 also contends that the Board violated Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554, because the hearing officer in the § 10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the § 8 Unfair Labor Practice Hearing. Section 554 provides in presently material part that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually

related case, participate or advise in the decision, recommended decision, or agency review. . . ." The avowed purpose of this provision of the Act is to ". . . curtail and change the practice of embodying in one person . . . the duties of prosecutor and judge." *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950). *See also Riss & Co., Inc. v. United States*, 341 U.S. 907 (1951). And it is true that in this case the presiding § 10(k) hearing officer also acted as a prosecutor at the Unfair Labor Practice Hearing.

In the Board's view it was not improper for the same person to perform the functions of hearing officer and subsequently prosecute an unfair labor charge based upon the evidence adduced at that hearing, simply because the hearing was without binding effect on anyone. While this
867 is technically so, it is also true that the hearing officer's rulings at the § 10(k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing, in which the hearing officer participates as an advocate. It is, we think, an oversimplification to say that the § 10(k) hearing has no binding effect. As Justice White put in in *NLRB v. Plasterers' Union*, 404 U.S. 116, 126-127 (1971),

> ". . . the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed."

The Board also argues that the combination of functions did not violate the Administrative Procedure Act because the hearing officer performed his prosecutorial duties only after he had already presided at the § 10(k) hearing. But, as Justice Jackson cogently observed in *Wong Yang Sung, supra*,

> "[a] genuinely impartial hearing, conducted with critical detachment, is psychologically improbable, if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation." 339 U.S. at 44.

It is apparently admitted that § 554 applies to § 10(k) hearings. And § 556 of the Act provides in presently material part that, in hearings required to be conducted in accordance with § 554, ". . . [t]here shall preside at the taking of the evidence . . . one or more hearing examiners appointed under Section 3105 of the title."[3] Section 3105 provides in presently material part that hearing examiners ". . . may not perform duties inconsistent with their duties and responsibilities as hearing examiners." This is, we think, a specific manifestation of the congressional intent that administrative officers who preside at such hearings be completely "isolated," "impartial," and "independent" (*see, e.g.*, 92 Cong. Rec.

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[3] We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal.

A-2982 (1946), 92 Cong. Rec. 2160 and 2163 (1946), 20 Fed. B. J. 74-76 (1960), and 27 Fed. B. J. 351 at 362 (1967); that there shall be no "commingling" of the functions of investigation or advocacy with the function of decision making. *See Wong Yang Sung, supra* at 44 *quoting* the Attorney General's Committee on Administrative Procedure. "It has been said that hearing examiners are the administrative equivalent of federal judges,"[4] Indeed, the title of hearing examiner has recently been changed to "Administrative Law Judge." *That is, see* 37 Fed. Reg. 16787 (No. 162, Aug. 19, 1972).

In our case the hearing officer had the duty of hearing the evidence in the case, and subsequently urging and relying upon it as prosecutorial evidence. We think that the knowledge on the part of the presiding officer that he
868 will subsequently advocate a postion based upon his own evidentiary rulings at the §10(k) hearing could very well influence his decisions at that hearing. This commingling of functions is plainly inconsistent with both the spirit and the letter of the Act, and, we think, incompatible with the accepted norms for the proper administration of justice. An order of the Board thus tainted should not be enforced.

Enforcement is accordingly denied.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circut.

[4] *See comments* of Henry S. Sham, NLRB Trial Examiner, at 20 Fed. B. J. 74, 79 (1960), *quoting* Mr. Earl W. Kintner, then Chairman of the Federal Trade Commission.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ALFRED P. MURRAH, Circuit Judge
Hon. STANLEY N. BARNES, Circuit Judge

LOCAL 134 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Petitioner, v. NO. 72-1822 NATIONAL LABOR RELATIONS BOARD, Respondent.	:	Petition for Review of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX B

197 NLRB No. 127 D–6358
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

and Case 13–CD–209

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION

DECISION AND ORDER

On February 7, 1972, Trial Examiner Thomas S. Wilson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief;[1] the Employer filed an answering brief, cross-exceptions, and a supporting brief; and the Intervenor, Communications Workers of America, AFL-CIO, filed a brief in support of the decision of the Trial Examiner.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[1] Attached to Respondent's brief were copies of the briefs it filed with the Board following the 10(k) hearing and its motion for reconsideration of our Decision and Determination of Dispute issued thereafter (191 NLRB No. 122).

The Board has considered the record[2] and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, with the modifications set forth below.

As more fully set forth in his Decision, the Trial Examiner found that shortly after the ITT employees arrived at the jobsite Respondent's steward, Becker, checked their union cards in the presence of other employee-members of Respondent and immediately announced either "I can't work here" or "We can't work here." However, he did not leave then, but shortly thereafter joined the foreman and other employees of Charles Johnson Electric Company, all of whom are represented by Respondent, for coffee.[3] During the conversation, Becker informed the other employees that one of the ITT technicians had a CWA card while the other showed no card. At the end of the coffee break, Steward Becker announced to the assembled employees, "I am leaving because I do not care to work with nonunion men." He thereupon left the jobsite and the other Johnson employees left after him.

It is clear from the totality of Steward Becker's conduct that he was not acting as an individual when he announced in advance his action to the assembled Johnson employees. He was acting in his role as steward

[2] Respondent's request for oral argument is denied as, in our opinion, the record and the exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[3] Contrary to the Trial Examiner's finding that members of Respondent employed by Illinois Bell Telephone Company and C.A. Riley Electrical Construction Company were also present at this coffee break, the record shows that only Johnson's employees and foreman were present.

when he inspected the union cards of the ITT employees and immediately made the statement referred to above. Rather than leaving the jobsite at that point, he joined the assembled Johnson employees for coffee. We can only infer that he did so to be certain that those employees were aware of the presence of the CWA members. It is apparent that his announcements of his findings regarding the union cards of the ITT employees and the action he was taking were a clear signal designed to "induce or encourage" the assembled Johnson employees to leave the jobsite as well.

We agree with the Trial Examiner that Respondent, by the above conduct of its steward, Becker, violated Section 8(b)(4)(i) of the Act. However, we base our finding on the fact that Steward Becker's conduct was directed at the employees of Johnson, not of, Riley. Contrary to the Trial Examiner, we are satisfied that the status of Johnson and Illinois Bell was in issue. The record fully establishes, and we find, that Riley, Johnson, and Illinois Bell, the secondary persons herein, are engaged "in an industry affecting commerce" within the meaning of 8(b)(4).[4] Accordingly, we shall modify the recommended Order to reflect our findings herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Trial Examiner, as herein modified, and orders that Respondent, Local No. 134, International Brotherhood

[4] *Sheet Metal Workers International Association, Local Union No. 299, AFL-CIO (S.M. Kisner and Sons),* 131 NLRB 1196, 1199.

of Electrical Workers, AFL-CIO, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Delete from paragraph 1(a) "C. A. Riley Electrical Construction Company" and substitute therefor "Charles Johnson Electric Company."

2. Delete from paragraph 2(b) "C.A. Riley Electric Construction Company" and substitute therefor "Charles Johnson Electric Company."

3. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C. June 22, 1972.

John H. Fanning, Member
Ralph E. Kennedy, Member
John A. Penello, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Charles Johnson Electric Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America. The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

TXD-70-72
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

and

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT & SYSTEMS DIVISION

Stephen S. Schulson, Esq., for the General Counsel.
John D. O'Brien, Esq., of Chicago, Ill., for the Charging Party.
Robert E. Fitzgerald, Jr., Esq., of Chicago, Ill., for Respondent I.B.E.W.
Jerome Schur, Esq., of Chicago, Ill., for the Intervener C.W.A.

TRIAL EXAMINER'S DECISION

Statement of the Case

Before THOMAS S. WILSON, Trial Examiner: Upon a charge duly filed on December 3, 1970, by International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, herein referred to as ITT-CESD, the General Counsel of the National Labor Relations Board, herein referred to as the General

Counsel[1] and the Board, respectively, by the Regional Director for Region 13 (Chicago, Ill.) issued its complaint dated September 10, 1971 against Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO, herein referred to as Local 134 or Respondent.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(D) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Chicago, Illinois, on November 4, 1971 before me. All parties, including Communications Workers of America, herein CWA, who were permitted to intervene, appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing oral argument was waived. Briefs were received from General Counsel, Respondent, ITT-CESD and CWA on November 29, 1971.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Business of Respondent

The complaint alleged, the answer admitted and accordingly I find:

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

ITT-CESD is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida and other states. During the past calendar year, ITT-CESD, in the normal course in conduct of its operations, has received goods and materials valued in excess of $100,000 which was shipped to its facilities directly across the state lines.

ITT-CESD is an employer within the meaning of Section 2(6) and (7) of the Act and is a person engaged in commerce or in an industry affecting commerce within the meaning of the Act.

II. The Labor Organizations

Local No. 134, International Brotherhood of Electrical Workers, AFL-CIO and Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Facts*

On August 27, 1970, ITT-CESD entered into a contract with the Village of Elk Grove, located in Cook County, Illinois, whereby ITT-CESD agreed to install and maintain for 1 year one of its PBX telephone systems in the new Administration Building of the Village of Elk Grove. On November 10, 1970, ITT-CESD subcontracted the necessary cable pulling work in connection with such contract to C.A. Riley Electric Construction Company whose employees were represented by Local 134. During all times materials herein, employees of Charles Johnson Electric Company and Illinois Bell Telephone Company

were also working in the new Administration Building. The employees of both these companies were also represented by Local 134.

On November 10, 1970 Lester Fulton, ITT-CESD supervisor of Maintenance and Installation of PBX Systems, met with C.A. Riley, president of C.A. Riley Electric Construction Company, who inquired as to who was going to do the cable termination and hanging of instrument work on the PBX system. Like a good businessman Riley wanted that work. Fulton answered that ITT-CESD would do that work with its own employees known as Communications Technicians, who, he informed Riley, were represented by CWA. Riley told Fulton that he, Riley, wanted to do the work and suggested that Fulton had best meet with Burton Van Wettering, a business agent for Local 134.

So the next day, November 11, Fulton met Van Wettering in Riley's office where, before excusing himself, Riley informed Van Wettering that ITT-CESD intended to do the terminal work on the PBX system with its own employees who were represented by CWA. Van Wettering then launched into a discussion of various union problems which had arisen and had been solved. He spent some 20 minutes over a problem the labor unions anticipated would arise with a project Leavitt and Son had in Cook County but which never arose due to prior discussions with the unions. Van Wettering told Fulton that the Cook County Building Trades knew that Leavitt and Son had built Leavittown, Pennsylvania, with nonunion help and so were prepared to "stop" Leavitt and Son on their project in Cook County if Leavitt and Son had tried to build that project with nonunion help. He told Fulton that at a pre-building meeting Leavitt and Sons decided to use union help so that the Cook County project proceeded unhampered. Lest the point be dismissed, Van Wettering brought out the fact that Leavitt and Son was also a subsidiary of ITT so that ITT-CESD was in the same category as Leavitt and Son. Van Wettering ended the conversation with a flat statement that CWA was not recognized in Cook County and that CWA would install no telephone equipment in Cook County.

On November 30, 1970 Joe Dale Foster, ITT-CESD Director of Labor Relations, met with Van Wettering at the Holiday Inn in Elk Grove Village and asked Van Wettering if he had any questions regarding the PBX job in the Administration Building of the Village. Van Wettering stated that Local 134 installed all telephone and PBX equipment in Cook County, Illinois, along with the maintenance work thereon. Foster reminded Van Wettering that ITT-CESD had subcontracted the cable pulling work at the Administration Building to Riley as they had in New York City and in Los Angeles and asked why he could not accept that. Foster also explained that ITT-CESD had a nationwide contract with CWA covering the installation employees. Van Wettering's answer was that CWA did not do telephone work in Cook County, that to allow that would be to recognize CWA which only had some clerical employees in Cook County. Van Wettering then reiterated his story about the Leavitt and Son's project in Cook County, that the Building Trades were prepared to "stop the job" if Leavitt and Son had attempted to build the project with nonunion help but that, to their surprise, Leavitt and Son had decided at a pre-job conference to do the job with union help. As the men shook hands at parting, Foster said that he hoped there would be no hard feelings if Van Wettering did not get the PBX work. To this Van Wettering answered: "We'd better get that work or there will be trouble." He asked that Foster contact his superiors and then let Van Wettering know their decision.

About 9:15 p.m. on December 2, 1970 Foster telephoned Van Wettering and told him that ITT-CESD was going to do the PBX work in the Administration Building with its own employees beginning the next morning. Promptly after the receipt of this telephone call, Van Wettering telephoned the Local 134 business manager at his home and informed him that CWA men would work on the PBX job the next day. The business manager ordered Van Wettering to go to the jobsite the next day to see if CWA employees were in fact working there.

Van Wettering testified that, as ordered, he was at the jobsite the following morning about 8 o'clock. Before leaving shortly thereafter he testified he spoke to no one except to say "Hello" to Robert Becker, the steward for Local 134 on that job.

About 10:15 a.m. that day Fulton arrived at the Administration Building with Communication Technicians Louis Rodriguez and Dennis Satriano, who are headquartered in New York City. As they entered the telephone room in the basement of the building where their work was to begin, there were already two employees of Illinois Bell present and already at work. One of these two employees, known in this record only as "Bart," immediately upon their entry announced that "if they are working here I am leaving" and began packing up his tools preparatory to departure as did the other Bell Telephone employee. A minute or two later steward Becker entered the telephone room, showed his Local 134 card to Fulton and asked to see the cards of Rodriguez and Satriano. Rodriguez showed Becker his CWA card but Satriano had no card to show.[2] Becker

[2] Becker testified that Satriano merely shrugged his shoulders as though he did not understand English while Fulton testified that Satriano explained in good English, which he spoke, according to

immediately announced to those present that either "I can't work here" or "we can't work here."[3] After this comment Becker and the four or five other employees of Johnson Electric drifted away.

Becker remained on the job for a few minutes until it was time to have a coffee break with the rest of the employees from Local 134 and Jack Schutten, superintendent for Johnson Electric on the job. During this coffee break, Becker was asked about the two ITT-CESD employees and answered that one of them had a CWA card while the other showed no card. At the end of the coffee break Becker told the assembled Local 134 employees that he was going home because he did not want to work with "nonunion men." He thereupon departed for home. The other Local 134 employees also left the jobsite. From home Becker telephoned the union office and left word for the business manager that "there were nonunion men on the job."

No Local 134 employees worked in the Administration Building for the rest of the day.

That afternoon George Coney, Director of Finance for the Village of Elk Grove, invited Harold George, Regional Sales Manager for ITT-CESD, who happened to be in the telephone room at the time with the Communications Technicians, to come upstairs. As George entered the

Fulton, that he had forgotten to bring his card from New York. If this difference were material, I would credit the testimony of Fulton.

[3] In his oral testimony Fulton testified that Becker used the plural whereas his affidavit puts the phrase in the singular. According to Becker, after seeing Rodriguez' CWA card and having Satriano "shrug his shoulders," he merely thanked him and left the room.

room Coney was talking to one Turnberg, superintendent for the General Contractor on the construction of the Administration Building. Coney asked Turnberg if the job would be completed. Turnberg answered that he could not complete the job if CWA was on the job. Thereupon Coney turned to George and asked if it would be possible not to have CWA on the job the following morning. George stated that it would be possible if Coney made a formal request. Coney made the formal request and George agreed that CWA would not be on the job the next morning. Coney thereupon turned to Turnberg and told him that CWA would not be on the job the next day. Turnberg then dialed a number on the telephone and reported to someone that CWA would not be on the job the next morning.

Late that afternoon Contractor Johnson of Johnson Electric telephoned Becker and informed him that he "could go back to work there, that these other fellows weren't going to be there." Accordingly Becker returned to work on the morning of December 4. All the other Local 134 employees also returned to work that day.

The ITT-CESD technicians did not return to work until December 21 and thereafter completed their work on the PBX system. The Johnson Electric and Riley Electric employees had completed their work in the Administration Building by December 21.

On the afternoon of December 3, 1970, ITT-CESD through its attorney filed the charge in this case alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring ITT-CESD to assign the work in dispute to members of Local 134 rather than to employees of ITT-CESD represented by Communications Workers of America, AFL-CIO.

A hearing on this dispute was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15 and 17, 1971.

On June 30, 1971 the Board, finding that it was satisfied "that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred," proceeded to determine the merits of the dispute and made the following specific determination of the dispute as follows:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, who are currently represented by Communications Workers of America, AFL-CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment & Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL-CIO.[4]

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[4] Respondent Union ends the first section of its brief as follows:

> Local 134 urges the Trial Examiner to recommend to the Board that it reconsider the previous decision [Decision and Determination of Dispute, 191 NLRB No. 132] because it was in error to have issued that decision in conflict with the above-cited authorities.

The short answer to this is, of course, that, as a Trial Examiner of the National Labor Relations Board, I enjoy no appellate jurisdiction over the actions of that Board but, on the contrary, am bound by the decisions of that Board.

On August 30, 1971, Local 134 admittedly informed the Regional Director of the Thirteenth Region that Local 134 did not intend to comply with the Board's aforementioned determination of dispute.

B. *Conclusions*

The evidence here proves and I, therefore, find that:

1. On November 11, 1970[5] and again on November 30, 1970, Union Agent Burton Van Wettering threatened, coerced and restrained two separate agents of ITT-CESD by warning that, unless ITT-CESD assigned the remaining PBX work of terminating cables and hanging instruments for the PBX system which ITT-CESD had contracted to install and maintain in the Administration Building of the Village of Elk Grove to members of Local 134 instead of to members of CWA, the work in the Administration Building and on that system would be "stopped."

In the conversation on November 11 this threat, while not stated in so many words, was made explicitly during Van Wettering's 20-minute harangue about how the Cook County Building Trades Council had decided "to stop" a Leavitt and Son project in Cook County unless Leavitt and Son decided to use union labor in the construction of the project instead of the nonunion labor which Leavitt and Son had used on its Leavittown project in Pennsylvania. This threat was explicit enough during his 20-minute lecture but Van Wettering left nothing to chance when he pointed out that Leavitt and Son was, like

[5] Despite Respondent's objection voiced for the first time in its brief, I use the events of this date although, as stated in the brief, the date was not alleged in the complaint because, despite that omission in the complaint, the conversation here found was fully litigated at the hearing.

ITT-CESD, an affiliate of ITT so that the two organizations were in exactly the "same category." The threat to shut down the Elk Grove administration project was implicit in everything Van Wettering had to say on November 11. A man need not be hit over the head to know that he is being threatened and coerced.

On November 30 Van Wettering went through this same 20-minute threatening harangue to another agent of ITT-CESD as to what would happen unless ITT-CESD assigned the remaining PBX work in the Village Administration Building to members of Local 134 instead of to ITT-CESD's own employees who were members of the CWA. On this second occasion, apparently bewildered that his first threats and coercion had proved unsuccessful, Van Wettering made the threat explicit by ending the conversation with the statement that, unless ITT-CESD assigned the remaining work on the PBX system to members of Local 134 "there will be trouble." This time Van Wettering was leaving nothing to chance.[6]

After Van Wettering's threats and coercion were proved unavailing as indicated by the telephone call of 9:30 p.m. to him on December 2 that ITT-CESD was assigning the work to its own employees, Van Wettering's prophecy was fulfilled on December 3 at the exact time that the ITT-CESD communications technicians began

[6] Respondent relies upon the denial by Van Wettering that he ever made the "there will be trouble" statement—which was the only element in either conversation which Van Wettering denied. The threat was there whether or not Van Wettering uttered the disputed words. These words merely made explicit what might be said to have been perfectly implicit theretofor. I have no doubt that Van Wettering on the second occasion became explicit. That was the purpose of the conversation.

work in the Administration Building. This stoppage by Local 134 hardly appears to have been a mere coincidence.

Upon the anticipated arrival of the ITT employees, the Local 134 steward, Thomas Becker, promptly checked the cards of the two technicians and found one with a CWA card and that the other had forgotten his card in New York City. Becker, knowing full well what the ITT-CESD technicians were on the premises due to his inspection of the work to be done, promptly stated "I am leaving because I do not care to work with nonunion men."[7]

Despite this statement, however, Steward Becker did not immediately depart the premises as promised but carefully waited until after he had had coffee with all the other Local 134 employees on the job, employees of Johnson, Illinois Bell, and also of Riley. At the end of coffee and after explaining that one ITT-CESD technician had a CWA card and the other none, Steward Becker announced to that assembly that he was leaving because he did not care to work with "nonunion men."[8] By this statement and by his action, Steward Becker at least sought to, and did, induce and encourage the other Local 134 members employed by Riley Electric "to refuse to perform any service" in the course of their employment. The encouragement was sufficient so that all Local 134 members left the premises at or about this time.[9]

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[7]It is to be noted here that Becker, despite this statement, knew that Rodriguez, at least, was a union man, albeit a member of CWA.

[8]This plural is Becker's.

[9]I include only the employees of Riley Electric Company in this for the technical–but unrealistic–reason that neither Johnson Electric nor Illinois Bell were alleged, or proved, to be "persons engaged in commerce or in an industry affecting commerce" and hence the employees of these two employers do not fit the description of Section 8(b)(4)(i). The employees of Riley, on the other hand, were engaged in work subcontracted from ITT-CESD which was admittedly an employer described in that section of the Act and hence Riley's employees would necessarily fit within Section 8(b)(4)(i) of the Act.

Van Wettering's conversations with the ITT agents made the object of his and Becker's actions so clear that no discussion of that is here required. Local 134 was going to do the ITT CESD PBX work in Cook County instead of the CWA employees or else the work in the Administration Building would be "stopped." This is prohibited by Section 8(b)(4)(D) of the Act.

Hence we have an agent of a labor organization, Steward Becker, inducing and encouraging employees of a person engaged in commerce and in an industry affecting commerce to refuse in the course of their employment to perform any services for the purposes of forcing or requiring an employer, ITT-CESD, to assign work in members of Local 134 instead of to employees represented by CWA which is a violation of Section 8(b)(4)(i)(D) of the Act.

Then we have an agent of a labor organization, Business Agent Van Wettering, threatening and coercing a person admittedly engaged in commerce or in an industry affecting commerce, ITT-CESD, with the object of forcing that employer to assign particular work, the PBX system work in the Administration Building of the Village of Elk Grove, to Local 134 members instead of to employees of ITT-CESD who happen to be members of CWA which is a violation of Section 8(b)(4)(ii)(D) of the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of ITT-CESD described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act I shall recommend that it cease and desist therefrom and take certain affirmative action designed to remedy the unfair labor practices of this nature.

Conclusions of Law

1. International Telephone & Telegraph Corporation, Communications Equipment & Systems Division and C.A. Riley Electric Construction C. are engaged in commerce or in an industry affecting commerce within the meaning of the Act.

2. Local 134, International Brotherhood of Electrical Workers, AFL-CIO, and Communication Workers of America, AFL-CIO, are labor organizations within the meaning of the Act.

3. Local 134 has failed and refused to comply with the Board's Decision and Determination of Dispute dated June 30, 1971 [191 NLRB No. 122].

4. Respondent, by threatening ITT-CESD and inducing and encouraging employees of an employer

engaged in commerce to engage in a strike or a refusal in the course of his employment to perform any services for the purpose of forcing or requiring ITT-CESD to assign particular work to members of Local 134 rather than to ITT employees, represented by CWA, has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(D) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that the Respondent, Local No. 134, International Board of Electrical Workers, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by C.A. Riley Electrical Construction Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his

[10]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, coercing, or restraining ITT-CESD, or any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD currently represented by CWA.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent's business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 13, shall after being duly signed by the Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

[11]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 13 for posting by ITT-CESD and C.A. Riley Electric Construction Company at all locations where notices to their respective employees are customarily posted, if they are willing to do so.

(c) Inform its members of its obligations set forth in the provisions of the aforesaid notice, by reading such document during regularly scheduled meetings of the membership, and by mailing a copy of same to each of its current membership.

(d) Notify the Regional Director for Region 13, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps Respondent has taken to comply herewith.[12]

Dated at Washington, D.C. February 7, 1972.

/s/ Thomas S. Wilson
Thomas S. Wilson
Trial Examiner

[12]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by C.A. Riley Electric Construction Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce or restrain any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force and require ITT-CESD to assign the work described below to employees who are members of or represented by Respondent rather than to employees of ITT-CESD, currently represented by Communication Workers of America.

The work involved consists of:

Terminating the cable and installing telephone instruments in Cook County, Illinois.

LOCAL NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Ill. 60604. Tel. No. (312) 353-7572

APPENDIX C

191 NLRB No. 122 D–5262
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 13–CD–209

LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO

and

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION

and

COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of a charge by International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, herein called the Employer, alleging that Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, herein called Local 134, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain proscribed activity with an object of

forcing or requiring the Employer to assign the work in dispute to members of Local 134 rather than to employees of the Employer represented by Communications Workers of America, AFL–CIO, herein referred to as CWA.

Pursuant to notice, a hearing was held in Chicago, Illinois, before Hearing Officer Stephen S. Schulson on March 12, 15, and 17, 1971. All parties appeared at the hearing and were given full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, briefs were filed by the Employer, Local 134, and CWA in support of their positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds them free from prejudicial error. They are hereby affirmed.[1] The Board

[1] We agree with the Hearing Officer's rulings that it was untimely for Local 134 to attack the validity of the collective-bargaining agreement between the Employer and CWA for 8(a)(2) purposes, and that material subpoenaed by Local 134 was therefore not relevant. Section 10(b) would bar the issuance of a complaint attacking CWA's representative status as of the time the present contract was executed. *Local Lodge No. 1424, International Association of Machinists v. N.L.R.B. (Bryan Manufacturing Company)*, 362 U.S. 411. Accordingly, as CWA's representative status could not be litigated under these circumstances, we agree that such evidence could not be adduced in an 8(b)(4)(D) proceeding for the purpose of collaterally attacking CWA's status as statutory bargaining representative.

Local 134 alleges that it was denied substantive due process by what it considers inadequate notice as to the scope of the hearing,

has considered the entire record in this case, including the briefs, and hereby makes the following findings:

I. The Business of the Employer

The parties stipulated, and we find, that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged in the distribution and installation of electronic telephone equipment and related products with facilities in the States of Connecticut, Illinois, Tennessee, New York, New Jersey, California, Florida, and other States. During the past calendar year, International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, in the normal course and conduct of its operations, has received goods and materials valued in excess of $100,000 which were shipped to its facilities directly from across state lines. Accordingly, we find that International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, is engaged

claiming that the Employer and CWA introduced evidence of events occurring beyond the jurisdiction of Local 134 and beyond its knowledge, thereby "tainting" the record. We disagree. The Board has consistently looked to the custom and practice of the industry, employer practice, and contract coverage as factors relevant to its consideration of the merits of the dispute. *International Association of Machinists, Lodge No. 1743, AFL–CIO (J.A. Jones Construction Co.)*, 135 NLRB 1402. Local 134 therefore had sufficient notice of the scope of the hearing on these matters. Further, the record, in our view, is of sufficient clarity to support a determination of dispute and an award confined to the area served by Local 134.

Accordingly, we find no merit in Local 134's requests to reopen the hearing.

in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, and Communications Workers of America, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. *Background Facts*

In 1969, the Federal Communications Commission issued the *Carterfone* decision[2] which allowed private individuals or firms to purchase their own telephone equipment and have it "interconnected" with an operating telephone company system. Prior to this, operating telephone companies had refused to permit private telephone systems to be connected to the operating company's trunklines. The Communications Equipment and Systems Division of International Telephone & Telegraph Corporation was established shortly after the FCC decision, in April 1969. The Employer is engaged in the sale, installation, testing, and maintenance of private telephone systems. The equipment sold by the Employer is manufactured by various divisions of International Telephone & Telegraph Corporation and is typically connected to the trunklines of the local operating telephone company.

[2] 13 FCC 2d 420.

The Employer entered into a contract with the Village of Elk Grove, Illinois, on August 27, 1970,[3] for the sale, installation, testing, and maintenance for 1 year of an EPABX[4] Model No. TE400 switching system and related telephone and circuitry work. The installation of this equipment involved the processes known as "pulling cable" and "terminating the cable;" the latter included installation of telephone instruments. The Employer subcontracted the work of "pulling cable" from the telephone room[5] to locations throughout the building to the C.A. Riley Electric Construction Co., a contractor whose employees are represented by Local 134. This work involved the pulling of 52 different cables and identification of each cable by physically tagging them so that it could readily be determined to which telephone sets they were to be connected. The Employer reserved the work of "terminating the cable" and the installation of the telephone instruments for its own employees, represented by CWA. C.A. Riley employees engaged in cable-pulling work from mid-November to mid-December. Employees of the Employer reported to the jobsite on December 3 and began installation of the EPABX equipment. At the request of village officials, made late in the day of December 3, the Employer did not return to the jobsite until December 21. The Employer thereafter completed the installation work on December 23.

[3] Unless otherwise noted, all events transpired in 1970.

[4] There is undisputed testimony in the record that the terms PBX, PABX, and EPABX are used interchangebly. The terms PABX and EPABX refer to refinements of the basic PBX system.

[5] Trunklines from the local operating telephone system were earlier installed by members of Local 134 employed by the Illinois Bell Telephone Company.

B. *Work in Dispute*

The work in dispute herein is the installation, testing, and maintenance of the PBX telephone switchboard and the installation of telephones, excepting telephones servicing the police and fire departments, at various locations of the Elk Grove village administration building, Elk Grove, Illinois. The work in dispute is limited to that phase of the installation concerning termination of the cable and installation of the telephone instruments.[6]

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Local 134 has violated Section 8(b)(4)(D) of the Act, and that the record supports its assignment of the work in dispute to its employees represented by CWA. The Employer cites considerations of skill, industry and company practice, efficiency and economy of operations, and its collective-bargaining agreement with CWA in support of its assignment. Additionally, the Employer urges that the Board's award in this proceeding be nationwide in scope. CWA has taken a position basically consistent with that urged by the Employer regarding the work in dispute and the scope of the award.

Local 134 argues that the record is insufficient to support a finding that it engaged in any conduct that would amount to an unfair labor practice within the meaning of Section 8(b)(4)(D). It also contends that the

[6] The Employer and CWA also argue the work of "cable pulling" should be assigned to employees represented by CWA. That work is not in dispute in this proceeding and, accordingly, we find it unnecessary to pass upon the merits of CWA's claim to that work.

work in dispute is within the jurisdiction of Local 134 and should be assigned to individuals represented by it. Local 134 offers considerations of area practice, license requirements, economy, the alleged recognition of its jurisdiction by the Employer, the contract between the Employer and CWA, and the loss of job opportunities by members of Local 134, in support of its claim for the work in dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. The record indicates that on November 11, Local 134 Business Agent Van Wetering told a representative of the Employer that CWA does not install telephones in Cook County.[7] Later, on November 30, prior to the time employees of the Employer represented by CWA appeared at the jobsite, Van Wetering met with the Employer's director for labor relations, Foster, and stated that Local 134 did the installation and maintenance of telephone equipment in Cook County. Van Wetering also told Foster on that occasion that Local 134 better do the work or there would be "trouble."

On December 3, when the Employer began installation of the EPABX equipment with CWA represented employees, there were Local 134 members employed by Johnson Electric Company, Illinois Bell Telephone Company, and C.A. Riley working at the jobsite. After a Local 134 steward ascertained that the Employer's

[7] Elk Grove, Illinois, is located within Cook County, Illinois.

employees were represented by CWA, he said, "We can't work here." Another Local 134 steward told other Local 134-represented employees that "if they [CWA] are working here we are leaving." Employees of all three contractors thereafter left the building site taking their tools with them.

Local 134 suggests that this testimonial evidence is incredible. In a jurisdictional dispute context, the Board is not charged with finding that a violation did in fact occur, but only that there is reasonable cause to believe that there has been a violation.[8] On this testimony, and without ruling on the credibility of the testimony in issue,[9] we are satisfied that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The parties have not submitted satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of this dispute. Under these circumstances, we find that it will effectuate the policies underlying Sections 10(k) and 8(b)(4)(D) of the Act for us to determine the merits of the dispute. Accordingly, we find that this dispute is appropriate for resolution under Section 10(k) of the Act.

On the basis of the entire record in this case, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination.

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[8] *Locals 138, 138A, 138B, 138C, and 138D, International Union of Operating Engineers, AFL–CIO (Cafasso Lathing & Plastering, Inc.)*, 149 NLRB 156, 158–159.

[9] See *Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO (Western Electric Company, Incorporated)*, 141 NLRB 888, 893.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors.[10] The Board has held that its determination of a jurisdictional dispute is an act of judgment based upon common-sense and experience reached by balancing those factors involved in a particular case.[11]

The following factors are relevant in making a determination of the dispute before us:

1. Certification and collective-bargaining agreements

Neither labor organization involved herein has been certified by the Board nor is there evidence indicating that a Board certification covers the disputed work.

The Employer is party to a current, nationwide collective-bargaining agreement with CWA. That agreement applies to "installation, replacement, and maintenance operations [of the Employer] in the United States or its possessions." Pursuant to this agreement, the Employer has assigned its employees represented by CWA to perform the work in dispute. The Employer is not, and never has been, party to any collective-bargaining agreement with Local 134. We conclude, therefore, that considerations of collective-bargaining history and agree-

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[10] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO (Columbia Broadcasting System)*, 364 U.S. 573, 586.

[11] *International Association of Machinists, Lodge No. 1743, supra.*

ments favor assignment of the work to employees represented by CWA.

2. Area, employer, and industry practice

Local 134 contends that only individuals represented by it have performed PBX installation work in Cook County, except for the instant dispute. In support of this contention, Local 134 relies primarily on the fact that Illinois Bell uses its own employees represented by Local 134 to install PBX equipment in Cook County. There is, however, uncontradicted testimony indicating that employees of Western Electric represented by CWA install and test central office equipment in Cook County for the operating telephone company, Illinois Bell. There is substantial evidence in the record before us to indicate that the work of installing and testing central office switching equipment and the work of installing and testing a PBX system are to a large degree quite similar in nature. Both are intended to "switch" telephone messages, albeit central office equipment is often constructed on a larger scale than is the ordinary PBX system. We note, in this regard, the uncontradicted testimony of the Employer's witness, Fulton, to the effect that a central office equipment man for an operating telephone company would be ideally qualified, by virtue of training and experience, to be a communications technician, the title the Employer gives to its employees performing the work in dispute.

In further support of its claim that its members are entitled to perform the work in dispute on the basis, in part, of established area practice, Local 134 points to a franchise agreement between International Telephone & Telegraph and Midco, Inc., for the installation of interoffice communications equipment (PAX) manufactured

by a division of IT & T in the years 1960 through 1968. Local 134 argues that the Employer thereby recognized its claim to work in dispute. Midco utilized employees represented by Local 134 when installing PAX equipment within the jurisdiction of Local 134. Midco installed only one PBX system, in 1970.

We conclude from the foregoing that considerations of area practice favor neither labor organization in making an award of the work in dispute; while Local 134 has performed all PBX work in the area, CWA-represented employees have performed highly similar work within Cook County. Moreover, area practice alone would not play a controlling role in our decision herein.

The nationwide industry practice is to assign the disputed work to individuals represented by CWA. In this regard, the record shows that it is the Employer's practice, on a nationwide basis, to assign this work to employees represented by CWA. The record also discloses that all installation of PBX equipment manufactured by Western Electric, a competitor of the Employer, is installed by employees of Western Electric or operating telephone companies represented by CWA, with the exception of work performed in Cook County and the State of New Jersey. Employees represented by Local 134 and International Brotherhood of Electrical Workers install Western Electric's PBX equipment in those areas, respectively. We find that Employer and industry practice favor assignment of the work in dispute to employees represented by CWA.

3. Skills and training of employees

In support of its assignment to employees represented by CWA, the Employer argues that the work of electricians and the work of telephone men is completely

dissimilar. Fulton testified that an electrician is neither trained in nor works with electronics or solid state circuitry, while electronics training is the basis for the work of a communications technician. Fulton estimated that it requires 6 years of training for one of its communications technicians to become "fully qualified" to install PBX systems. The Employer also conducts special training classes for particular items of its equipment, including a 4-week training program for the type of PBX installed in the instant dispute.

Local 134 has not alleged that its members have had any experience with the particular type of equipment installed in the Elk Grove Village project, although there are some 40 electricians registered with Local 134's hiring hall who are one-time Bell Systems employees, and at least some of these 40 have had experience with PBX equipment while with Bell. Local 134 maintains no separate listing of its PBX-qualified members.

The record establishes to our satisfaction that the work of a communications technician, as employed by the Employer, and an electrician, as represented by Local 134, is significantly different and requires dissimilar training and techniques. Indeed, Local 134 described itself in its brief as "a union whose members traditionally perform electrical work on new construction work in conjunction with other building trades unions." In our view, the work in dispute is not properly described as "electrical work on new construction work" but rather the installation of an item of highly sophisticated communications equipment. Accordingly, we find that consideration of the factors of skill and special training favor assignment of the disputed work to employees of the Employer represented by CWA.

4. Efficiency and economy of operations

The record indicates that communications technicians employed by the Employer and represented by CWA are paid at a substantially lower hourly rate than are journeymen electricians represented by Local 134. Communications technicians have a maximum hourly wage of $3.27 while a journeyman electrician is rated at almost $8 per hour. A journeyman employee of a sound contractor, also represented by Local 134, receives $5.48 on an hourly basis.

C.A. Riley Company made a bid of $2,600 for the work of terminating the cable. The Employer's witness testified that this bid was about $1,000 too high. Riley's bid for the termination work was based upon an approximate 200 hours of work, later reduced to an estimated 180 hours. The record indicates that employees of the Employer performed this same work in no more than 96 hours.

The sales agreement between the Employer and Elk Grove Village includes a provision that the Employer will perform necessary maintenance work for a period of 1 year. We have found that maintenance requirements often militate in favor of an employer's assignment, especially when factors of training in installation and service of an employer's specific equipment are present.[12] Such factors are present in the instant dispute. We find that factors of both economy and efficiency support an award of the work in dispute to employees represented by CWA.

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[12]See, e.g., *Radio-Television-Sound Technicians Local Union 1139, International Brotherhood of Electrical Workers, AFL–CIO (Motorola Communications and Electronics, Inc.)*, 180 NLRB No. 154.

5. Other factors

Local 134 has raised a number of other issues that, it alleges, supports its claim to the work in dispute. It argues that the Employer failed to comply with certain general licensing requirements for electrical work, and that such requirements extend to the installation of telephone communications equipment.[13] It is undisputed that the Employer was not issued a license for the performance of the work in dispute. The question of licensing, in these circumstances, is irrelevant. Local 134's witness, a supervisor of electrical inspection for Chicago, testified on cross-examination that whether or not an employer's employees were represented by CWA, Local 134, any other union, or no union, was completely immaterial to the requirement of obtaining a license. Thus, licensing requirements, such as they may be, concern the employer's qualifications for the work and not its assignment of it. They provide no assistance in our consideration of the merits of this dispute.

Local 134 also claims that failure to award the work to it will result in a loss of job opportunities for its members. In the context of this case, we do not accord this argument great significance. There are approximately

[13]The Employer argues in its brief that the general licensing requirements for electrical work do not apply to the installation of telephone communications equipment and notes that Local 134's assertion is predicated exclusively upon an interpretation of an allegedly relevant ordinance by a supervisor of electrical inspection for Chicago. Respondent has offered no citation to a court of competent jurisdiction that has squarely ruled upon the applicability of these licensing requirements to the installation of telephone communications equipment such as is present in the instant dispute.

6,000 to 8,000 individuals registered as construction electricians with Local 134's seniority system, and an additional 400 to 500 members of Local 134 are classified as sound, radio-television, and public address electricians. Contrasted with this, the Employer employs an approximate total of 50 communications technicians throughout the nation. The Employer has proposed to locate no more than six technicians in the Chicago area. It is apparent that an assignment of the work to individuals represented by CWA will have no substantial effect upon the job opportunities available to individuals represented by Local 134.

We do not find that the additional considerations alleged by Local 134 provide substantial support in favor of an award to individuals represented by that labor organization.

F. *Conclusions*

Having considered all pertinent factors present here, we conclude that employees represented by CWA are entitled to perform the work in dispute. This assignment is compatible with the collective-bargaining agreement between CWA and the Employer. Such an award is consistent with industry and employer practice, and is not clearly inconsistent with area practice in Cook County regarding the installation of PBX and similar systems. In addition, members of CWA possess the requisite skills and training, the Employer has been satisfied with their performance, and continued assignment will result in greater efficiency and economy of operation. We conclude from all of the foregoing that the Employer's assignment of work to employees represented by CWA should not be disturbed. On the basis of the entire record, therefore, we shall determine the existing

jurisdictional controversy by awarding the work in dispute to employees of the Employer represented by CWA. In making this determination, we are assigning the disputed work to the employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are represented by Communications Workers of America, but not to that Union or its members.

G. *Scope of the Determination*

The work which gave rise to the instant dispute has been completed. The Employer and CWA request the award encompass the Employer's entire operation, i.e., nationwide. Alternatively, the Employer and CWA request that the award encompass Cook County, Illinois. Local 134's position throughout the hearing and in its brief to the Board has been that the Notice of Hearing and, therefore, the scope of the work, was limited to the jurisdiction of Local 134, which generally consists of Cook County. As Local 134, has not indicated that it will renounce its claim to the work in dispute, and as the Employer has continued to seek sales agreements within Cook County that include performance of the work in dispute, we find that the dispute is likely to recur between the parties. We shall, therefore, encompass Cook County, Illinois, within the scope of our determination of the dispute.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the foregoing findings and the entire record in this case, the National Labor Relations Board hereby makes the following determination of dispute:

1. Employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, who are currently represented by Communications Workers of America, AFL–CIO, are entitled to perform the work of terminating the cable and installing telephone instruments in Cook County, Illinois.

2. Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, to assign the above work to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, shall notify the Regional Director for Region 13, in writing, whether or not it will refrain from forcing or requiring International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the work in dispute to individuals represented by Local Union No. 134, International Brotherhood of Electrical Workers, AFL–CIO, rather than to employees of International Telephone & Telegraph Corporation, Communications Equipment and Systems Division, represented by Communications Workers of America, AFL–CIO.

Dated, Washington, D.C., Jun. 30, 1971.

John H. Fanning, Member

Gerald A. Brown, Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

ADMINISTRATIVE PROCEDURE ACT

§551. Definitions.

For the purpose of this subchapter–

* * * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * * * *

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved–

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of–

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for–

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not–

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply–

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

* * * * *

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence–

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of

presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may–

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial

evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without

further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses–

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions–

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of–

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

APPENDIX E

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * * *

§158. Unfair labor practices

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents–

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is–

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

§160. Prevention of Unfair Labor Practices

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the

parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

APPENDIX F

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, SERIES 8, AS AMENDED

29 C.F.R. §101.31 – §101.35

Subpart F–Jurisdictional Dispute Cases Under Section 10(k) of the Act

Sec. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*–The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the regional director serves on the parties a copy of the charge together with a notice of the filing of such charge.

Sec. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*–These matters are handled as described in section 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act are given priority over all other cases in the office except other cases under section 10(1) of the act and cases of like character.

Sec. 101.33 *Initiation of formal action; settlement.*–If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the

filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator. a proceeding under section 8(c) of the act, or any other satisfactory method to resolve the dispute. If the agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with that determination.

Sec. 101.34 *Hearing.*–If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

Sec. 101.35 *Procedure before the Board.*–The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

Sec. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.